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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,
Petitioner,

v.

HYDROLEVEL CORPORATION,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS

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QUESTIONS PRESENTED

The *amicus curiae* adopts the statement of questions presented by the petitioner, The American Society of Mechanical Engineers, Inc.

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To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 36 (1) of the Rules of this Court, the National Society of Professional Engineers ("NSPE") submits this brief as *amicus curiae* supporting the Petition for A Writ of Certiorari in this case.

The written consents of counsel for the petitioner, The American Society of Mechanical Engineers, and the respondent, Hydrolevel Corporation, have been filed with the Clerk of the Court.

INTEREST OF THE *AMICUS CURIAE*

1. The NSPE is a non-profit organization composed of over 80,000 members through 53 affiliated state organizations (including the District of Columbia, Puerto Rico and Guam) and approximately 500 local chapters. Its membership includes professional engineers engaged in virtually every specialized branch of engineering practice and activity—in industry, private practice, government, and education. From its inception, the NSPE has sought to bring to the attention of courts, administrative agencies, and apropriate committees of Congress, information and data concerning the impact of federal laws, rules and policies upon the public and upon the engineering profession.

2. A significant number of NSPE members are engaged in engineering and business-related activities which relate to, and rely in substantial part on, use of various technical codes and standards adopted and interpreted by private organizations, similar in scope and purpose to the types of codes promulgated by the petitioner in this case. The legal principles involved in this case are of a nature which will have major impact on the future development and use of technical codes in the United States, and will thereby be of major concern to the members of NSPE and other engineers who rely upon such technical codes.

3. In addition to the effect of the decision below on technical code development and use, the legal standard of responsibility and liability stated in the decision of the Court of Appeals portends serious concern for NSPE and other similarly situated professional organizations with regard to potential liability for unauthorized acts of its volunteer members in carrying out the functions of the organization in non-technical professional matters.

STATEMENT OF THE CASE

The facts of this case are fully set forth in the Petition for A Writ of Certiorari of the Petitioner, and are adopted by the *amicus curiae.*

SUMMARY OF ARGUMENT

The petition for plenary review of this case should be granted because it raises novel and major issues of interpretation of the Sherman Act relative to the liability exposure of non-profit, voluntary professional organizations for the unauthorized acts of their members. If the decision of the Court of Appeals in this case is, indeed, the proper interpretation of the antitrust laws, the legal principle thereby established will have serious effects upon the ability of such organizations to engage in traditional activities which have as their purpose the establishment of codes and standards necessary to carry forward technological advancement in the United States.

The case before the Court is an appropriate one under its clear facts to enable the Court to provide guidance for non-profit voluntary member organizations in their future activities in the development and application of technical codes and standards, as well as other non-technical activities which impinge upon services and programs of such organizations related to serving the public health, safety and welfare.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS IS VAGUE AND UNCERTAIN IN ESTABLISHING A STANDARD OF CONDUCT WHICH CAN BE RELIED UPON BY ORGANIZATIONS AFFECTED BY THE LEGAL PRINCIPLE AT ISSUE. GUIDANCE FROM THIS COURT IS ESSENTIAL TO DEFINE THE ACTUAL OR POTENTIAL LIABILITY EXPOSURE OF ORGANIZATIONS ENGAGED IN THE ESSENTIAL VOLUNTARY STANDARDS SYSTEM OF THE UNITED STATES.

As noted by the decision of the Court of Appeals in this case, technical codes and standards ". . . have great influence in the [engineering] profession and the marketplace." 635 F. 2d 118, at 121. Indeed, it is no exaggeration to say that the technological progress of the United States in the past hundred years, or more, has rested in substantial part on the development and use of the voluntary standards system.

The Federal Government itself relies heavily upon technical standards promulgated by the many voluntary standards bodies. Circular A-119, issued by the Office of Management and Budget on January 17, 1980, entitled, "Federal Participation in the Development and Use of Voluntary Standards," recognized ". . . a policy encouraging the participation of Federal agencies and their representatives in voluntary standards bodies which conduct their standards activities in accordance with specified due process and other criteria . . ." See Vol. 45, p. 37374, *Federal Register*, June 2, 1980.

The language of § 1 of the Sherman Act, barring and making illegal agreements or actions ". . . in restraint of trade . . ." is exceedingly broad, and has necessarily been the subject of numerous decisions by this Court placing substantive meaning on those bare words under specific facts on a case-by-case basis. This case is an appro-

priate one for such treatment to establish and define the meaning of the broad language of the Sherman Act on the unresolved issue of whether the type of conduct involved in this case is within the contemplation of the Sherman Act when the misconduct of volunteer members of an organization, not sanctioned or embraced by the organization itself, or for the benefit of the organization, is the basis for a finding of a violation of § 1 of the Sherman Act.

As recently noted by this Court, "In antitrust, the federal courts enjoy more flexibility and act more as common-law courts than in other areas governed by federal statute." *Northwest Airlines, Inc.* v. *Transport Workers Union*, —— U.S. ——, n. 42, Docket No. 79-1056, decided April 20, 1981.

The case before the Court is such a case which lends itself to the flexibility required to resolve the important issue of organizational liability for self-serving acts of its volunteer members serving on committees which carry out functions of the organization.

II. THE LEGAL PRINCIPLES INVOLVED IN THIS CASE EXTEND BEYOND AN IMPACT ON TECHNICAL STANDARDS AND CODES. THE "APPARENT AUTHORITY" BASIS RELIED UPON BY THE COURT OF APPEALS MAKES VULNERABLE A MULTITUDE OF PROFESSIONAL SOCIETY PROGRAMS.

If extended to its logical conclusion, the use of the "apparent authority" test employed by the Court of Appeals, raises a considerable concern that many activities of professional societies, over and above technical standards and codes activities, could subject the organization to antitrust liability for improper and unauthorized conduct of its members in carrying out socially desirable programs in the public interest.

It is not beyond reasonable conjecture that programs involving voluntary certification of qualifications, or interpretation of professional codes of ethics by judicial-type boards for guidance of the members of the profession could conceivably be the subject of abuse for personal gain by one or more members of the committee designated to perform those functions for the organization.

It would be literally impossible for professional societies engaged in a multiplicity of activities of the type indicated to establish an internal review or monitoring procedure to be certain that members of the activity committee do not have ulterior motives.

The more reasonable and proper standard in the event of abuse of the responsibility and authority granted the volunteer society member serving in such capacity should run to the individual(s) who act without actual or implied authority to issue opinions or make rulings which are tantamount to a restraint of trade. To hold the organization itself liable for antitrust penalties in such circumstances must necessarily cast a cloud over continuation of socially desirable areas of professional activity.

CONCLUSION

For the foregoing reasons, the petition for A Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: May 22, 1981